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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
	)	

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COMMENTS OF CABLEVISION SYSTEMS CORPORATION

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Cablevision Systems Corporation ("Cablevision"), by its attorneys, hereby submits its comments in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding ("Notice").

INTRODUCTION AND SUMMARY

In the Telecommunications Act of 1996,[1/] Congress enacted several provisions altering the regulatory framework and rules governing the provision of cable television service that were established by the Commission in response to the Cable Television Consumer Protection and Competition Act of 1992.[2/] These provisions reflect Congress' objective in the 1996 Act of eliminating regulation wherever possible, and relying instead on "the development of marketplace forces to ensure that consumers have diverse and high quality entertainment and information choices at affordable rates."[3/]

[1/]Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996) ("1996 Act" or "Act").

[2/]See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

[3/]H.R. Rep. No. 204, 104th Cong., 1st Sess. 54 (1995) ("House Report").

The Commission should adopt rules that deregulate cable rates in any franchise area where a local exchange company (LEC) or its affiliate is offering comparable multichannel video programming service, regardless of the LEC's penetration rate or number of homes passed within that franchise area. The plain language and legislative history of the 1996 Act evidence Congressional intent to allow cable rates to be dictated by market forces wherever a telephone company begins to offer comparable multichannel video programming service. Congress recognized both that LECs represent a unique and formidable competitive challenge in the multichannel video programming services market due to their size, financial resources, and ubiquitous presence and brand recognition, and that existing rate rules hamstring the ability of cable operators to quickly respond to telco competition by introducing new services or offering innovative marketing and packaging options. Accordingly, Congress devised a new test for rate deregulation that expressly omitted inclusion of a homes passed or penetration test. The Commission's implementing rules must adhere to Congress' decision to provide cable operators with maximum flexibility to respond expeditiously to competition from telephone companies.

In accordance with the Act's objectives, as well as the policies underlying the Notice of Proposed Rulemaking regarding regional rate-setting,[4/] the Commission's implementing rules also should preserve opportunities for integrated cable system operators serving multiple franchise areas from a single headend to retain the benefits of both their economies

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[4/]See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, Uniform Rate-Setting Methodology, Notice of Proposed Rulemaking, CS Docket No. 95-174 (released November 29, 1995) ("Uniform Rate-Setting Notice").

of scale and deregulation as they begin to face competition from telephone companies. Because of their superior size and financial strength, the LECs serving the bulk of the nation enjoy substantial economies of scale. If, however, deregulation under the new effective competition test proceeds on a franchise area-by-franchise area basis, and LECs initially enter only the most lucrative franchise areas served by an integrated, multi-franchise cable system operator, then that operator would be forced into making a Hobson's choice between retaining its economies of scale or foregoing the rate and service flexibility attendant to deregulation. To avoid this result, and maximize competition between telcos and cable operators, the Commission should permit an integrated, multi-franchise area cable system operator to charge a uniform deregulated rate throughout its entire service area, once at least 50 percent of the franchise areas that it serves are subject to competition from a telco.

The Commission's rules also should adhere to Congress' intent to provide cable operators with substantial flexibility to charge discounted rates in multiple dwelling units.[5/] This is an important issue for Cablevision because a substantial portion of its subscriber base reside in MDUs.[6/] To avoid constraining cable operators' ability to provide bulk discounts to MDUs, the Commission should not limit the reach of the Act's MDU exception to the uniform rate requirement only to instances where a bulk rate is negotiated directly with -- or billed to, and paid by -- the building owner or property manager. Nor should the

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[5/]47 U.S.C. § 543(d).

[6/]It is estimated that 70 percent of Cablevision's potential customers in Boston reside in buildings with 6 or more units, while 85 percent of its potential customers in New York City and 60 percent of its potential customers in Hudson County, New Jersey live in MDUs with 4 or more units.

Commission require cable operators to negotiate a bulk discount on behalf of all tenants within an MDU as a precondition of eligibility for the new bulk rate exception set forth in the 1996 Act. Congress sought to maximize cable operators' ability to respond to competition in MDUs, and any artificial restrictions imposed upon operators' attempts to offer bulk discounts in MDUs will only disadvantage them in relation to competitors such as Liberty Cable that enjoy full freedom to devise bulk rate packages to MDUs.

Finally, to effectuate the Act's intent to reduce unnecessary regulation, the Commission should make clear that states and local franchising authorities are precluded from adopting rules that are inconsistent with the regulatory reform provisions adopted by Congress. Thus, for example, a state or local franchising authority would be preempted by the 1996 Act from adopting a uniform rate requirement for unregulated services or imposing mandatory technical standards that exceed Federal requirements as a condition of the grant or renewal of a franchise.

I. THE COMMISSION SHOULD IMPLEMENT THE NEW EFFECTIVE COMPETITION TEST IN ACCORD WITH THE LANGUAGE AND INTENT OF THE 1996 TELECOMMUNICATIONS ACT

In amending the 1992 Cable Act's definition of effective competition to include instances in which a telephone company offers comparable multichannel video programming services within a cable operator's franchise area,[7] Congress implicitly recognized in the

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[7]Under the 1992 Cable Act, a system is subject to effective competition if fewer than 30 percent of the households in its franchise area subscribe to it; or if the franchise area is served by at least two unaffiliated multichannel video programming distributors ("MVPDs") each of which offers comparable programming to at least 50 percent of the households in the franchise area and the number of households subscribing to programming services offered by

1996 Act that telephone companies represented a unique and formidable competitor whose very presence within an operator's service area would ensure reasonable, market-based rates for cable service. Telephone companies have deployed ubiquitous wireline networks within their service areas, enjoy a monopoly revenue stream in the $66 billion[8/] local exchange business, and have achieved the aggregate of 93.9 percent[9/] penetration of their potential customer service base in telephony. The size and strength of the telephone companies' network assets and revenue streams, as well as their strong brand recognition and pervasive marketing presence within their service areas, are unmatched by any other potential cable competitor.

MVPDs other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area; or if a franchise authority-operated MVPD offers video programming to at least 50 percent of the households in the franchise area. See 47 U.S.C. § 543(l)(1)(A)-(C). The 1996 Telecom Act added a new fourth prong to the effective competition test, which finds that effective competition exists where:

> [a] local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

See 47 U.S.C. § 543(l)(1)(D).

[8/]See Trends in Telephone Service, Industry Analysis Division, FCC Common Carrier Bureau, 49 (rel. May 1996)(showing total local revenues for telephone companies in 1994 as $65,992,000,000).

[9/]Id. at 3; see also Telephone Subscribership in the United States, Industry Analysis Division, FCC Common Carrier Bureau, 7 (rel. Feb. 1996).

Under these circumstances, Congress had ample reason to conclude that once a telephone company begins to offer multichannel video programming services within a cable operator's franchise area, rates in that area would be dictated by competitive market conditions. Likewise, Congress recognized that the regulatory regime created by the 1992 Cable Act could hinder the ability of cable operators to respond to competition in a timely fashion by introducing new services, upgrading their systems, or repackaging existing offerings.[10/] Accordingly, the Commission's implementation of the new prong of the Cable Act's effective competition test should conform to the Congressional determination -- reflected in the actual language of new Section 543(l)(1)(D)[11/] -- that telephone company provision of competing multichannel video programming service offerings will automatically deter cable operators from charging unreasonable rates

A. The Commission Should Not Adopt Any Numerical Pass or Percentage Penetration Test as a Requirement for Satisfying the New Effective Competition Test

In the Notice, the Commission requests comment as to whether Congress intended for the new effective competition test enacted by the 1996 Act to include a homes passed or penetration test.[12/] The imposition of such a requirement would flatly contravene the plain

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[10/] See House Report at 54.

[11/] 47 U.S.C. § 543(l)(1)(D).

[12/] See Notice at ¶ 72 ("We seek comment as to whether Congress intended effective competition to be found if a LEC's, or its affiliate's, service was offered to subscribers in any portion of the franchise area, or whether the competitor's service must be offered to some larger portion of the franchise area to constitute effective competition.")

language and intent of the amendment to the definition of effective competition set forth in the 1996 Act.

As the Commission acknowledges, the "new definition of effective competition does not, unlike the other three effective competition tests, include a percentage pass or penetration rate."[13/] By itself, the lack of such a penetration or homes passed requirement in the amendment is dispositive.[14/] Because the other effective competition tests expressly contain a homes passed or penetration requirement, basic principles of statutory construction preclude interpreting the new test to include such a requirement, since it was not expressly incorporated into the new test in a similar manner.[15/] Likewise, interpreting the new prong to exclude a homes passed or penetration requirement accords with the Act's legislative

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[13/]Id.

[14/]See Notice, Separate Statement of Rachelle B. Chong at 2:

> In adopting the effective competition without a specific pass or penetration rate, Congress made its intention clear that this fourth effective competition test would be met if the LEC offered service in any portion of the franchise area. If Congress had intended a higher standard, ... it would have specified a pass or penetration rate as it did in the other three effective competition tests

[15/]See e.g., BFP v. Resolution Trust Corp., 114 S.Ct. 1757, 1761 (1994) ("'[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another,'" quoting Chicago v. Environmental Defense Fund, 114 S.Ct. 1588, 1593 (1994)); Rodriguez v. United States, 480 U.S. 522, 525 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposefully."); West Coast Truck Lines v. Arcata Comm. Recycling, 846 F.2d 1239, 1244 (9th Cir. 1988) ("When some statutory provisions expressly mention a requirement, the omission of that requirement from other statutory provisions implies that Congress intended both the inclusion of the requirement and the exclusion of the requirement.") (emphasis in original).

history.[16] Both the Senate and House versions of the 1996 Act contained provisions deregulating cable rates in a franchise upon the offering of competing multichannel video programming service by a telephone company,[17] and neither version contained a penetration or homes passed test.[18]

Congress' decision not to include a numerical pass or penetration requirement in the new fourth prong of the effective competition test comports with the special nature of LEC entry into video programming. The new effective competition test is premised on the notion

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[16]For example, Senator Leahy, in debating an amendment -- which was ultimately rejected -- to the cable regulatory reform provisions of the Senate version of the 1996 Act, stated that:

> The telecommunications bill, as reported, would change this law by deeming 'effective competition' to be present wherever a local phone company offers video programming, regardless of the number of subscribers to, or households reached by, the service.

141 Cong. Rec. S8427 (daily ed. June 15, 1995) (statement of Sen. Leahy). See also 141 Cong. Rec. S7887 (daily ed. June 7, 1995) (statement of Sen. Pressler) ("The bill maintains rate regulation for basic tier of programming where the cable operator does not face effective competition - defined as the provision of video services by a local telephone company or 15 percent penetration by another multichannel video provider") (emphasis added); 141 Cong. Rec. S7896 (daily ed. June 7, 1995) (statement of Sen. Hollings) ("the bill changes the definition of effective competition in the 1992 Act to allow cable rates to be de-regulated as soon as the telephone company begins to offer competing cable services in the franchise area") (emphasis added).

[17]See S. 652, 104th Cong., 1st Sess. § 203(b)(2), June 23, 1995; H.R. 1555, 104th Cong., 1st Sess. § 202(h)(3), October 12, 1995.

[18]See House Report at 109 ("The Committee intends that any common carrier, or an affiliate of such common carrier, that is authorized to provide video programming through video dialtone or directly to consumers by any means will trigger a finding of effective competition under subsection (h) of the legislation."); S. Rep. No. 23, 104th Cong., 1st Sess. 40 (1995) ("Senate Report") ("Under the bill, if a telephone company offers video services in a cable operator's franchise area, the cable operator's basic and expanded tiers of service will not be regulated.").

that "the provision of video programming services by a telephone company subjects a cable operator to effective competition that will ensure reasonable rates and high quality services more effectively than government micromanagement."[19] Congress recognized appropriately that LECs would constitute particularly robust competitors in the multichannel video programming services market:

> Looming large on the fringes of the [video programming services] market are the telephone companies. The telephone companies pose a very highly credible competitive threat because of their specific identities, the technology they are capable of deploying, the technological evolution their networks are undergoing for reasons apart from video distribution, and, last but by no means least, their financial strength and staying power.[20]

Given the financial strength and technological prowess of the telephone companies, Congress reasonably concluded that the mere presence of a telephone company within a cable operator's franchise area would ensure competitive market rates.[21] Indeed, given their ubiquitous presence, LECs that commence offering competing multichannel video programming in their service areas do not face financial, technological, or marketing constraints that might hinder their ability to quickly expand into unserved portions of the

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[19] House Report at 109.

[20] 141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler). See also id. (noting "the perceived strength of the competition telephone companies are expected to bring to bear").

[21] Cf. 141 Cong. Rec. S8430 (daily ed. June 15, 1995) (Statement of Sen. Burns) ("When telephone companies are able to compete with cable companies, as this legislation allows, a competitive cable market would: First, put downward pressure on cable service rates; Second, lead to greater diversity of television programming and program choices; Third, accelerate the introduction of new services; and Fourth, increase consumer access to high quality service.")

franchise area they have begun to serve.[22/] Thus, Congress correctly recognized that a LEC's commencement of service to a portion of an operator's franchise area would render the entire area subject to competitive rates, since incumbents that sought to charge unreasonable rates would do so at the risk of driving their customers into the arms of a competing telephone company either planning to -- or easily capable of -- expanding its service to encompass the entirety of the franchise area.

While a penetration or homes passed requirement is unnecessary to assure competitive rates in markets where LECs have begun to offer service, the adoption of such a requirement would thwart the Act's purposes by hindering the ability of cable operators to respond to competition. For example, in Connecticut, Southern New England Telephone's ("SNET's") MVPD subsidiary, SNET Personal Vision, has filed with the Connecticut Department of Public Utility Control an application for a certificate of public convenience and necessity to provide cable service pursuant to a single, statewide franchise.[23/] SNET Personal Vision's initial two-year deployment schedule includes portions of ten different existing franchise areas.[24/] But the entirety of some of those ten different franchise areas will not be built out

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[22/]The Commission's observation that "an incumbent cable operator's response to the presence of a competitor may depend not just upon the current pass rate of the competitor, but also on its potential pass rate," Notice at ¶ 72, is inapposite where the competitor is a LEC. Cable operators that assume that "technical constraints" might hinder a LEC's ability to service their entire franchise area do so at their peril. Even where LECs are entering the multichannel video programming services market through MMDS systems, their financial and technological resources give them ample opportunity to exploit opportunities in adjacent areas that might initially be beyond the reach of those systems

[23/]See Application of SNET Personal Vision, Inc. For a Certificate of Public Convenience and Necessity to Provide Community Antenna Television Service, Docket No. 96-01, Department of Public Utility Control, filed January 25, 1996.

[24/]There are a total of 24 franchise areas in Connecticut. See id.

for many years hence.[25] If the Commission were to implement a numerical pass or penetration test, Cablevision would be hamstrung in its ability to respond to SNET's competitive advances while it waited until SNET's cable services achieved a certain minimum level of penetration or a certain pass rate.[26]

While the Commission recently has taken significant steps designed to lighten regulatory burdens on cable operators,[27] the fact remains that rate regulation rules impose substantial constraints on operators' ability to respond to competitive challenges in an expeditious and timely manner by introducing new services or repackaging existing offerings. Congress sought to provide cable operators with maximum flexibility in responding to competition from telephone companies. Because prior notice and approval for such changes is almost invariably required, rate regulation can hinder an operator's ability to devise new packages or undertake marketing initiatives that are necessary to remain competitive. In addition, the prior notice and approval of service or package changes affecting regulated tiers

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[25] See id.

[26] Moreover, a minimum homes passed or penetration test would augment SNET's unfair advantage since its decision to provide statewide service not only would enable it to "cherry-pick" the most desirable areas in the state during the initial roll-out, but it would also have the ability to delay the onset of deregulation in the town-based franchise areas served by incumbent cable operators. Such a result would be clearly at odds with the deregulatory intent of the 1996 Telecom Act and would pose competitive barriers for cable operators that serve no legitimate purpose.

[27] See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation; Uniform Rate-Setting Methodology, Notice of Proposed Rulemaking, CS Docket No. 95-174, FCC No. 95-472, (rel. Nov. 29, 1995) ("Uniform Rate-Setting Notice"); see also In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Thirteenth Order on Reconsideration, 11 FCC Rcd 388 (rel. Sept. 22, 1995).

effectively telegraphs in advance operator responses to telco competition.[28] While the new effective competition test was designed to reduce the burdens and disadvantages associated with regulatory lag so that operators could respond effectively to telco competition, the imposition of a homes passed or penetration test would resurrect those burdens.

Because adoption of a penetration or homes passed requirement would be contrary to the language, legislative history and policies of the 1996 Act, the Commission should decline to impose such a requirement. Instead, the Commission's rules should simply provide that where a LEC offers service within a cable operator's franchise area, that area is deemed subject to effective competition.[29]

B. The Commission Should Clarify That An Integrated Multi-Franchise Area Cable System Facing MVPD Competition In 50 Percent Of Its Franchise Areas Is Deemed Subject To Effective Competition Throughout All Of Its Integrated Service Area

Given the formidable size and strength of LEC competitors entering the multichannel video programming services market, it will be important for cable operators to take advantage of any economies of scale and scope available to them in responding to the

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[28]Rate regulation also imposes significant administrative costs associated with regulatory filings, cf. House Report at 54, that are particularly unwelcome in the face of nascent competition from telcos.

[29]The express retention of the existing definition of the term "offer" by Congress, see Conference Report at 170, should allay any concerns the Commission might have that the absence of a penetration or homes passed test would permit an incidental or fringe offering of service by a LEC to a handful of subscribers within a franchise area to trigger deregulation. In assessing whether a LEC "offers" competing multichannel video programming service within a franchise area, the Commission must determine the LEC "is physically able to deliver service to potential subscribers" and whether there are "no regulatory, technical or other impediments to households taking service...and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the [MVPD]." 47 C.F.R. § 76.905(e).

competitive challenge posed by telephone company entry into the cable business. As the Commission itself has recognized, many cable operators serve multiple franchise areas "with a single, integrated cable system" that transmits service to several franchise areas from a single headend.[30/] These integrated systems benefit subscribers because the economies of scale which they offer can lower service costs, and thus translate into lower end-user rates. In addition, as the Commission recognizes, "facilitating an operator's ability to advertise a single rate for cable service over a broad geographic region may lower marketing costs and enhance the operator's efficiency in responding to competition from alternative service providers that typically may establish and market uniform services and rates without regard to franchise area boundaries."[31/]

Because the Commission proposes to deregulate cable systems facing competition from LECs on a franchise area-by-franchise area basis, however, an integrated cable system serving multiple franchise areas may be forced to surrender the benefits of its scale economies at the time when they are most important: when it is faced with competition from well-financed and strongly-branded telephone companies Under a franchise area-by-franchise area approach, for instance, an operator that wanted to respond to competition and still maintain scale economies would need to file for regulatory approvals in the regulated areas before it could roll out the new offerings necessary to respond to competition from a LEC in unregulated areas. Regulatory lag would delay or even preclude the operator from effectively meeting the competition, and deny consumers access to the new offerings. Such a

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[30/] See Uniform Rate-Setting Notice at ¶ 13.

[31/] Id. at ¶ 12.

requirement would also provide an unfair advantage to competitors who would not face a similar requirement but would nevertheless benefit from knowing the cable operator's competitive strategies well in advance of their being approved and implemented. The only alternative for the cable operator would be to forgo the economies of scale and roll out new offerings only in the franchise areas in which the LEC has begun offering service.

For example, Cablevision operates an integrated cable system serving franchise areas in Newark and South Orange, New Jersey. Under the Commission's proposed approach, if a LEC or its affiliate were to begin offering video service in Newark but not South Orange, Cablevision would be forced to choose between availing itself of the marketing and pricing flexibility in Newark alone, or continuing to operate the system as an integrated whole and forgoing that flexibility.

Integrated system operators serving multiple franchise areas could be placed at a particular disadvantage if competing LECs opt to roll-out service only to the most lucrative franchise areas served by an integrated system To avoid imposing on cable operators a Hobson's choice between the flexibility of deregulation and the benefits of scale economies, the Commission should clarify that an integrated system facing competition from a LEC in 50 percent or more of the franchise areas it serves is deemed to face effective competition throughout its service area.[32/] Such an approach would be consistent with the regional rate-

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[32/]It would not be unreasonable for the Commission to require that eligible integrated system operators to charge the same rate in franchise areas not subject to competition from LEC as they charge in franchise areas that are directly subject to competition. Of course, these operators would also retain the option under existing rules to forego their economies of scale and take advantage of deregulation in those franchise areas that are subject to direct competition from LECs, while continuing to charge regulated rates in those franchise areas that are not yet subject to effective competition.

setting approaches being discussed by the Commission, and would ensure that cable operators have the opportunity to compete against LECs in the most cost-effective manner.

II. THE 1996 ACT REQUIRES THE COMMISSION TO ACCORD CABLE OPERATORS MAXIMUM FLEXIBILITY TO CHARGE BULK DISCOUNTS IN MDUs

The 1996 Act amended the uniform rate requirement set forth in the 1992 Cable Act by providing that "[b]ulk discounts to multiple dwelling units shall not be subject to" the general mandate of uniform rates imposed upon the regulated services and equipment offered by cable operators that are not subject to effective competition.[33/] By its terms, the only constraint upon a cable operator's ability to offer bulk rates to MDUs imposed by the Act's amendment to Section 543(d), is a prohibition against charging "predatory prices to a multiple dwelling unit" in franchise areas that are not subject to competition.[34/] The MDU bulk rate exception to the uniform rate requirement was enacted by Congress because it viewed the Commission's pre-Act rules as "effectively prohibiting cable operators from offering *lower* prices in an MDU even where there is another distributor offering the same video programming in that MDU."[35/]

Thus, Congress clearly intended the amendment to section 543(d) to override regulatory restrictions that hindered cable operators' ability to offer discounted rates in

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[33/] See 47 U.S.C. § 543(d).

[34/] Id.

[35/] House Report at 109 (emphasis in original).

MDUs. The implementing proposals discussed by the Commission in the Notice,[36] however, could revive the type of artificial constraints against offering bulk discounts in MDUs that Congress sought to prevent. For example, the Notice seeks comment on whether bulk discounts permitted by the amendment to Section 543(d) "include discounts offered to MDU residents who are billed individually, or should only be permitted where the discount is deducted from a bulk payment paid to the cable operator by the property owner or manager on behalf of all of its tenants."[37] Limiting the scope of the bulk rate exception only to instances where the MDU owner or manager is billed for services would serve no useful policy purpose and severely hamstring cable operators' ability to respond to competition in MDUs.

Based on Cablevision's experience, the management and owners of most MDUs that negotiate bulk discounts prefer to have the MVPD provider bill residents individually for service, because they do not wish to be responsible for serving as the central billing agent for MVPD services. Indeed, the ability to offer such billing arrangements is a necessity in the increasingly competitive MDU market. For example, Liberty Cable is offering such arrangements in MDUs located in Cablevision's franchise areas serving New York City and the New Jersey suburbs. In two specific examples, Liberty negotiated special MDU bulk rate discounts with the Towers West in West New York, N.J. and with The Parker Imperial in Weehauwken, N.J. In both cases, the buildings' management accepted Liberty's service offer following Liberty's guarantee that it would bill residents individually. These buildings'

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[36] Notice at ¶ 98.

[37] Id.

management staffs were interested in limiting their involvement with the MVPD service provider to only the initial negotiation of bulk rates, leaving the individual subscriber billing and solicitation of newly arrived residents to Liberty. Cablevision's inability to offer such arrangements would put it at a clear competitive disadvantage to Liberty in the MDU marketplace. Accordingly, the Commission should permit cable operators to take advantage of the MDU bulk discount exception, regardless of whether tenants or building managers are billed for service.

Likewise, the Commission's suggestion that the bulk rate exception should only be permitted where a discount is negotiated by the property manager "on behalf of all of its tenants"[38/] also would thwart price competition in MDUs. Forcing cable operators to obtain 100 percent penetration of an MDU as a precondition for charging discounted bulk rates harms both competition and consumer choice. Both Cablevision and its competitors currently offer bulk discounts in MDUs where they do not enjoy 100 percent penetration, with the size of the discount often varying depending upon the level of penetration achieved within the building. Such a practice provides individual tenants with the opportunity to both benefit from bulk discounts and choose between competing service providers. By contrast, requiring cable operators to obtain a bulk discount on behalf of all tenants within an MDU would stifle price competition, transform landlords and property managers into gatekeepers, and prevent individual tenants from choosing between two competing service providers offering discounted rates. Moreover, some landlords in New Jersey MDUs will not enter into bulk discount agreements premised upon 100 percent penetration of their tenants.

[38/] See id. (emphasis added).

Accordingly, the Commission should make clear that the bulk rate exception applies regardless of the level of penetration achieved by a cable operator within a MDU.

Cablevision also takes issue with the tentative conclusion that a "bulk discount must be negotiated by the property owner or manager on behalf of all of the tenants."[39/] Nothing in the Act or the legislative history suggests that Congress intended to limit the exception to the uniform rate requirement to instances where a discount was formally negotiated with MDU property managers or building owners. The imposition of such a condition would enhance the power of landlords and property owners relative to individual subscribers, by allowing tenants to benefit from discount price competition only in circumstances where the building manager decides to negotiate a bulk discount with competing service providers.[40/] Nothing in the Act suggests an intention by Congress to turn landlords into gatekeepers of price competition within their buildings. Indeed, the very purpose of the exception was to facilitate the ability of competing providers to charge "lower" prices in MDUs,[41/] and that objective would be thwarted if lower prices could only be charged with the consent of the landlord or property owner.

Requiring the MDU owner or manager to serve as the gatekeeper to bulk-discounted cable service also would prevent cable operators from marketing bulk rates successfully to

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[39/]Notice at ¶ 98.

[40/]The Commission's tentative conclusion also overlooks the underlying rationale for bulk discounts in MDUs. Operators can offer bulk discounts to MDUs because the aggregate buying power of multiple subscribers is concentrated in a single location. Thus, the operator's ability to offer a discount does not result from the negotiation of a building-wide rate with the property owner, but instead stems from its ability to deliver service to a concentrated locus of subscribers.

[41/]House Report at 54

building management entities, like those of housing cooperatives ("co-ops") and condominiums, who have little or no financial incentive to serve as a billing or even negotiating intermediary between the residents and the MVPD provider. Under the Commission's proposal, cable operators like Cablevision would be restricted to offering service to large residential rental buildings whose management would be more open to negotiating bulk MDU rates for residents.

Permitting the bulk rate exception to take effect only in MDUs where cable operators obtain 100 percent penetration, or only in instances where building owners are billed for -- or actually negotiate -- bulk discounts, would contravene the 1996 Act by unnecessarily and artificially restricting price competition and lower rates. Accordingly, the Commission should revise its tentative conclusion regarding the scope of the bulk rate exception, and make clear that the exception applies regardless of whether building managers are billed for, or negotiate, the discounted rates charged in MDUs by cable operators. The Commission's rules also should make clear that cable operator eligibility for the bulk rate exception does not depend upon the achievement of 100 percent penetration within an MDU.

III. STATES AND LOCALITIES MAY NOT ADOPT RULES THAT CONFLICT WITH THE REGULATORY REFORM PROVISIONS ADOPTED BY CONGRESS IN THE 1996 ACT.

A. The Commission Should Make Clear that States and Local Franchising Authorities May Not Impose Uniform Rate Requirements that Are Inconsistent with Federal Law.

Consistent with the D.C. Circuit's holding in Time Warner v. FCC, Congress' uniform rate structure provision in the 1996 Telecom Act eliminates the uniform rate

structure requirement in any franchise area subject to effective competition.[42] The amendment also makes clear that all programming services offered on a per-channel or per-program basis are exempt from the uniform rate structure requirement, regardless of whether a franchise area is subject to effective competition.[43]

While the revised rule proposed by the Commission conforms to the Congressional amendment to the uniform rate-setting requirement, the Commission also should make clear that states and localities are precluded from adopting rules that are inconsistent with the uniform rate-setting requirements established by Congress. As the D.C. Circuit Court held in Time Warner, "a mandate that cable operators charge uniform rates is clearly a form of rate regulation."[44] Thus, any attempt by states or local franchising authorities to impose uniform rate requirements on unregulated services or in areas subject to effective competition not only would be inconsistent with the 1996 Act, but also would contravene the 1992 Act by imposing "a form of rate regulation" in circumstances where it is not authorized by Federal law.[45] Since it is clear that Congress has occupied the field of cable rate regulation, including establishing the conditions under which states and local franchising authorities may engage in such regulation,[46] they have no authority to impose any uniform regional rate

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[42] 47 U.S.C. § 543(d).

[43] Id.

[44] 56 F.3d at 191.

[45] 47 U.S.C. § 543(a)(1).

[46] Id.

requirements upon cable operators that are in any way at variance with those prescribed by Congress and the Commission.

B. Local Franchising Authorities May Not Mandate or Impose Technical Standards More Stringent Than Those Imposed by the Commission

In the Notice, the Commission notes correctly that the 1996 Telecom Act amends Section 624(e) of the Communications Act[47] to eliminate the ability of local franchising authorities to apply for a waiver from the FCC in order to impose technical standards governing the picture quality and performance of cable television systems that are stricter than the FCC's standards.[48] In amending the Commission's Rules to reflect this statutory change, the Commission should clarify that new Section 624(e) applies to LFA negotiations concerning system upgrades and renewals as well as for general purposes.

While the 1996 Act does not explicitly modify the franchising or renewal provisions of Title VI, Section 624(e) was intended to prohibit LFAs, in any context, from imposing technical requirements on cable systems that are different from those imposed by the Commission. The conferees could not have been clearer: they adopted the House technical standards provision, which "prohibit[s] States or franchising authorities from regulating in the areas of technical standards, customer equipment, and transmission technologies."[49] Consistent with this intent, the Commission should also clarify that any existing LFA

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[47] 47 U.S.C. § 544(e).

[48] Notice at ¶¶ 40-41, 101-104.

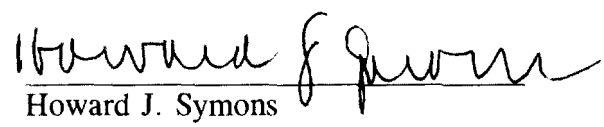
[49] See Telecommunications Act of 1996 Conference Report, S. Rep. No. 104-230 at 168 (Feb. 1, 1996).

technical standards that are stricter than those imposed by the Commission are nullified by the 1996 Telecom Act's amendment to Section 624(e).

CONCLUSION

For the reasons detailed above, the Commission should adopt rules that implement the 1996 Act's cable regulatory reform provisions in a manner consistent with the arguments set forth herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Linda H. Kovan, certify that on this 4th day of June 1996, I caused copies of the foregoing Comments to be sent by hand-delivery to the following:

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